

A **Bird Dominic Jude v Public Prosecutor**

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO
05–226–09 OF 2013(W)
ZULKEFLI CJ (MALAYA), AHMAD MAAROP, ZAINUN ALI,
JEFFREY TAN AND RAMLY ALI FCJJ
8 APRIL 2014

C *Criminal Procedure — Appeal — Appeal against acquittal — Arrest pending
D appeal — Accused charged for trafficking drugs but acquitted and discharged —
Prosecution appealed against acquittal and discharge — Whether warrant of arrest
defective — Whether prosecution must tender proposed petition of appeal to
demonstrate perverseness of trial court's judgment — Whether there were merits in
prosecution's appeal*

E In the High Court, the accused ('the appellant') was charged in the High Court
for the trafficking drugs, an offence under s 39B(1)(a) of the Dangerous Drugs
Act 1952. However, he was acquitted and discharged. The prosecution ('the
respondent') appealed against the acquittal and discharge to the Court of
Appeal and simultaneously, applied under s 56A of the Courts of Judicature
F Act 1964 ('CJA') for a warrant of arrest for the appellant to be arrested and
remanded in prison pending the disposal of the prosecution's appeal at the
Court of Appeal. The Court of Appeal held that the balance of justice laid in
favour of admitting the appellant to bail until the disposal of the respondent's
appeal. Dissatisfied, the appellant filed present appeal and argued that the
G appellant's fundamental rights by virtue of arts 5(1) and 8(1) of the Federal
Constitution were violated; the warrant of arrest was defective because the
grounds stated were contrary to established facts and contained false
accusation; the appellant was never informed that he was supposed to attend
before the Court of Appeal on 9 September 2013; and that the respondent
must tender a proposed petition of appeal to demonstrate the perverseness of
H the judgment of the trial court.

Held, dismissing the appeal:

I (1) The defect in the warrant of arrest was not fatal and did not affect the
respondent's application. The court agreed with the findings of the Court
of Appeal that at the first stage of the ex parte application, the respondent
had fulfilled the threshold requirement to justify the granting of the
warrant of arrest, directing the appellant to be brought before the court.
The said warrant was issued pursuant to a valid legal power of the court.
It had been executed and the appellant was brought before the court on

- 10 September 2013. The warrant itself made reference to the provision of s 56A of the CJA and the order of court given on 10 September 2013 (see para 13). **A**
- (2) There had not been a substantial miscarriage of justice as a result of the flawed terms of the warrant as contended by the appellant. The court was required at the second stage of the inter partes hearing of the respondent's application to either remand the appellant to prison or to admit him to bail. Any irregularity of the initial arrest which arose from the flawed terms of the warrant of arrest had been overtaken by the subsequent event when the appellant was brought before the court on 10 September 2013. The court had the jurisdiction to hear the second stage of the application notwithstanding any irregularity or flaws in the terms of the warrant of arrest (see para 14). **B**
- (3) Section 56A of the CJA is designed to confer judicial power upon the court to grant an order that will have the effect of preserving the integrity of any criminal appeal pending before it. It is intended to facilitate a full hearing of the appeal on its merits so that justice is not only done to the accused but also to the public and state. Section 56A of the CJA serves the specific purpose of ensuring that the right of the prosecution to appeal is not rendered academic or nugatory as a result of the absence or non-attendance of an accused who had been acquitted by the High Court. As long as an accused person is acquitted at the High Court, the public prosecutor can apply for a warrant under s 56A of the CJA (see paras 16–17). **C**
- (4) An appeal is a continuation of a trial. Consequently, the criminal proceeding against the appellant is continued. This gives jurisdiction to the Court of Appeal to re-hear the case and decide on the appellant's guilt or innocence in respect of the drug trafficking charge against him. The power to remand the appellant or admit him to bail pending the disposal of the appellant's appeal by the Court of Appeal was necessary for an effective exercise of the court's jurisdiction over the offence allegedly committed by the appellant. It would not be desirable that pending the appeal against the acquittal of a capital offence such as drug trafficking; the acquitted person should remain at large without conditions while his fate has yet to be decided by the appellate court (see para 19). **D**
- (5) At the stage of its application under s 56A of the CJA, the prosecution would not be placed in a position to put up a proposed petition of appeal to state that the order of acquittal recorded by the High Court was perverse or clearly erroneous in the face of the record. The merits of the prosecution's appeal in an application under s 56A of the CJA were not a relevant matter for consideration (see para 21). **E**
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A [Bahasa Malaysia summary]

Di Mahkamah Tinggi, tertuduh ('perayu') telah dituduh di Mahkamah Tinggi kerana mengedar dadah, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Walau bagaimanapun, dia telah dibebas dan dilepaskan.

- B** Pendakwaan ('responden') telah merayu terhadap pembebasan dan pelepasan itu ke Mahkamah Rayuan dan pada masa yang sama, memohon di bawah s 56A Akta Mahkamah Kehakiman 1964 ('AMK') untuk waran tangkap agar perayu ditangkap dan ditahan di penjara sementara menunggu rayuan pendakwaan selesai di Mahkamah Rayuan. Mahkamah Rayuan telah
- C** memutuskan bahawaimbangan keadilan ditetapkan memihak perayu diikat jamin sehingga selesai rayuan responden. Tidak berpuas hati, perayu telah memfailkan rayuan ini dan berhujah bahawa hak-hak asasi perayu menurut perkara-perkara 5(1) dan 8(1) Perlembagaan Persekutuan telah dilanggari; waran tangkap adalah defektif kerana alasan-alasan tersebut menyatakan
- D** sebaliknya untuk membuktikan fakta dan mengandungi pertuduhan palsu; perayu tidak pernah diberitahu bahawa dia sepatutnya hadir di hadapan Mahkamah Rayuan pada 9 September 2013; dan bahawa responden hendaklah menenderkan petisyen rayuan yang dicadangkan untuk menunjukkan kefasikan penghakiman mahkamah perbicaraan.

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Diputuskan, menolak rayuan:

- F** (1) Kecacatan dalam waran tangkap tidak memudaratkan dan tidak menjejaskan permohonan responden. Mahkamah bersetuju dengan penemuan Mahkamah Rayuan bahawa di peringkat pertama permohonan ex parte, responden telah memenuhi keperluan ambang untuk mewajarkan pemberian waran tangkap yang mengarahkan perayu dihadapkan ke mahkamah. Waran tersebut telah dikeluarkan menurut kuasa perundangan mahkamah yang sah. Ia telah dilaksanakan dan
- G** perayu telah dihadapkan ke mahkamah pada 10 September 2013. Waran itu sendiri merujuk kepada peruntukan s 56A AMK dan perintah mahkamah telah diberikan pada 10 September 2013 (lihat perenggan 13).
- H** (2) Tiada pelaksanaan keadilan yang substantial akibat daripada terma waran yang cacat seperti dihujah oleh perayu. Mahkamah dikehendaki di peringkat kedua perbicaraan inter partes kepada permohonan responden sama ada menahan perayu di penjara atau untuk mengikat jaminnyanya. Apa-apa luar aturan berhubung tangkapan awal yang timbul daripada terma-terma yang cacat dalam waran tangkap telah diambil alih oleh
- I** kejadian berikutnya apabila perayu dihadapkan ke mahkamah pada 10 September 2013. Mahkamah mempunyai bidang kuasa untuk mendengar peringkat kedua permohonan walaupun terdapat apa-apa ketidakaturan atau kecacatan dalam terma-terma waran tangkapan itu (lihat perenggan 14).

- (3) Seksyen 56A AMK digubal untuk memberi kuasa kehakiman kepada mahkamah untuk memberi perintah yang akan memberi kesan memelihara integriti apa-apa rayuan jenayah yang belum selesai di hadapannya. Ia bertujuan untuk memudahkan perbicaraan penuh rayuan atas merit supaya keadilan bukan hanya dilakukan kepada tertuduh tetapi juga kepada orang ramai dan kerajaan negeri. Seksyen 56A AMK merupakan tujuan tertentu yang memastikan hak pendakwaan untuk merayu tidak menjadi akademik atau yang bukan-bukan akibat ketiadaan atau ketidakhadiran tertuduh yang telah dilepaskan oleh Mahkamah Tinggi. Selagi tertuduh dilepaskan di Mahkamah Tinggi, pendakwa raya boleh memohon waran di bawah s 56A AMK (lihat perenggan 16–17). A
- (4) Rayuan adalah sambungan perbicaraan. Berikutan itu, prosiding jenayah terhadap perayu bersambung. Ini memberi bidang kuasa kepada Mahkamah Rayuan untuk mendengar semula kes dan memutuskan kebersalahan atau ketidakbersalahan perayu berkaitan pertuduhan pengedaran dadah terhadapnya. Kuasa untuk menahan perayu atau mengikat jaminannya sementara menunggu selesai rayuan perayu oleh Mahkamah Rayuan adalah perlu untuk keberkesanan pelaksanaan bidang kuasa mahkamah terhadap kesalahan yang dikatakan telah dilakukan oleh perayu. Ia suatu yang tidak diingini jika rayuan yang belum selesai terhadap pelepasan suatu kesalahan besar seperti pengedaran dadah; orang yang dilepaskan patut tidak terikat dengan syarat-syarat sementara menunggu nasibnya yang masih belum diputuskan oleh mahkamah rayuan (lihat perenggan 19). B
- (5) Di peringkat permohonannya di bawah s 56A AMK, pendakwaan tidak boleh diletakkan dalam kedudukan untuk mengemukakan cadangan petisyen rayuan bagi menyatakan bahawa perintah pelepasan yang direkodkan oleh Mahkamah Tinggi adalah fasik atau jelas salah pada rekod tersebut. Merit-merit rayuan pendakwaan dalam pendakwaan di bawah s 56A AMK bukan perkara relevan untuk pertimbangan (lihat perenggan 21).] C

Notes

- For cases on appeal against acquittal, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 180–213. D

Cases referred to

- Balasingam v PP* [1959] 1 MLJ 193 (refd) E
- Datuk Haji Harun bin Haji Idris v PP* [1977] 2 MLJ 155, FC (refd) F
- Lee Kwan Woh v PP* [2009] 5 MLJ 301, FC (refd) G
- Mohamad Ezam bin Mohd Nor, Re* [2001] 3 MLJ 372, HC (refd)
- PP (DPP) v Norman bin Ismail* [2008] 4 MLJ 830, CA (refd)
- Saw Kim Hai & Anor v Reg* [1956] 1 MLJ 21 (refd) H

- A *State of UP v Poosu & Anor* 1976 3 SCC 1, SC (refd)
State (at the prosecution of Robert Trimbole otherwise known as Micheal Hanbury), The v The Governor of Mountjoy Prison [1985] IR 550, HC (refd)

Legislation referred to

- B Criminal Procedure Code s 41
Criminal Procedure Code [IN] s 390
Courts of Judicature Act 1964 s 56A
Dangerous Drugs Act 1952 s 39B(1)(a)
Federal Constitution arts 5, 5(1), (3), 8, 8(1)
- C Indian Constitution art 136
Irish Constitution [IR] art 40
Rules of Court of Appeal 1994 r 58

Appeal from: Criminal Appeal No W-05–216–09 of 2013 (Court of Appeal, Putrajaya)

- D *Shafee Abdullah (Tania Scivetti with him) (Shafee & Co) for the appellant.*
Saiful Edris bin Hj Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

- E **Zulkefli CJ (Malaya) (delivering judgment of the court):**

INTRODUCTION

- F [1] This is an appeal by the appellant against the decision of the Court of Appeal in granting the application of the prosecution under s 56A of the Courts of Judicature Act 1964 ('CJA') and admitting the appellant to bail until the disposal of the respondent's appeal against the decision of the High Court
- G acquitting and discharging the appellant for the offence of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952. At the conclusion of the trial on 4 September 2013, the appellant was acquitted and discharged by the High Court after the court ruled that the defence had succeeded in raising a reasonable doubt on the prosecution's case.

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- [2] Section 56A of the CJA provides as follows:

Where an appeal is presented against an acquittal, the Court of Appeal may issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail.

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The application of s 56A of the CJA has to be read in conjunction with r 58 of the Rules of Court of Appeal 1994 which states as follows:

- (1) Within fourteen days of the decision of the High Court or within such

extended time as the Court may allow the appellant shall file in the Registry of the High Court at the place where the decision appealed against was given a Notice of Appeal and eight copies thereof. A copy of the Notice of Appeal shall be sent by the appellant to the Registrar of the Court of Appeal.

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(2) The Notice of Appeal shall be substantially in Form 5 in the First Schedule.

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(3) As soon as Notice of Appeal is filed by the Public Prosecutor as in sub-rule (1), the Court of Appeal may on an application by the Public Prosecutor issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail in accordance with the provisions of section 56A of the Courts of Judicature Act 1964 [Act 91].

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(4) The application under sub-rule (3) may be made by motion ex parte and for the purpose of this sub-rule, rules 71 and 72 shall apply.

PROCEEDINGS AT THE COURT OF APPEAL

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[3] The prosecution was dissatisfied with the decision by the High Court and filed a notice of appeal on 9 September 2013 and at the same time applied by way of notice of motion under s 56A of the CJA to the Court of Appeal seeking a warrant of arrest directing the appellant be arrested and remanded in prison pending the disposal of the prosecution's appeal at the Court of Appeal. The grounds advanced by the prosecution in supporting their application essentially are these. Section 56A is enacted to secure the attendance of an accused person at the hearing of an appeal against him who was earlier acquitted and discharged by the High Court. The provision as provided for under s 56A is to be applied judiciously and the prosecution has never abused this provision as it has been used sparingly. It is only applied whenever there is a strong likelihood of success in the appeal proper.

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[4] The appellant in opposing the prosecution's application questioned the constitutionality of s 56A of the CJA and asserted that his fundamental rights guaranteed under arts 5(1) and 8(1) of the Federal Constitution ('FC') are violated. The appellant also contended that the warrant of arrest was defective as the grounds contained therein were contrary to established facts and contained false accusation.

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[5] The Court of Appeal upon balancing the relevant factors held that the balance of justice lay in favour of admitting the appellant to bail at RM50,000 with two local sureties, and in default, a warrant be issued committing the appellant to prison until the disposal of the prosecution's appeal against the acquittal decision of the learned High Court judge. As for the conditions of the bail, the appellant had to surrender his travel documents. The appellant had to also provide the address of his fixed place of residence and report to the nearest police station every monday at 5pm.

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A SUBMISSION OF THE APPELLANT

B [6] Learned counsel for the appellant submitted before us that this court should take cognisance that s 56A of the CJA is silent on the procedure of an application for a warrant of arrest and its due execution. It was argued that the provisions of the Criminal Procedure Code ('CPC'), in particular s 41 of the CPC, should be resorted to as well in relation to the application of s 56A of the CJA to give the application of the said section its full effect. On that note it is the contention of the appellant that the procedural requirement under s 41 of the CPC has not been complied with by the respondent. Section 41 of the CPC provides as follows:

D The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person arrested and if so required shall show him the warrant or a copy thereof under the seal of the Court issuing the warrant.

E [7] Learned counsel for the appellant further submitted that under art 5(3) of the FC the appellant was also entitled to be informed on the grounds of his arrest. Article 5(3) of the FC states:

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

F [8] Based on the facts of this case it is the appellant's contention that the respondent had failed to notify and explain the substance of the warrant to the appellant as mandatorily required under s 41 of the CPC and under art 5(3) of the FC.

G [9] Learned counsel for the appellant also submitted that the warrant of arrest executed on the appellant was defective. It was argued that the substance of the warrant of arrest which formed the basis and grounds for the issuance of the warrant was badly drafted without an iota of truth in it to secure the arrest of the appellant. It is the contention of the appellant that he was never informed that he was supposed to attend before the Court of Appeal on 9 September 2013 at 9am. It was inaccurate to state in the warrant that the appellant 'sengaja gagal hadir di Mahkamah tersebut' when in fact no such notice had ever been issued by the Court of Appeal to request the appellant to appear before the Court of Appeal for the hearing of the appeal that never took place on 9 September 2013. Even if the appellant were informed of the hearing of the appeal proper, he was not able to abscond or refuse to attend because he was at all material times in the custody of the Department of Immigration of Malaysia since his acquittal on 4 September 2013, which fact was known to the

respondent. Furthermore, there was no need for him to attend as it was not the hearing of the appeal proper itself as incorrectly stated in the warrant of arrest.

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[10] It is the submission of the appellant that such gross failure to consider the mandatory requirement under s 41 of the CPC and art 5(3) of the FC by the respective authorities executing the warrant of arrest has rendered the arrest of the appellant under s 56A of the CJA invalid and unlawful.

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[11] On the constitutionality of s 56A of the CJA it was submitted for the appellant amongst others that it is an established principle of law that has been adopted consistently by the courts, that in dealing with laws which infringed the fundamental liberties of an individual, such laws must be interpreted restrictively, and that laws which emphasised the liberty of an individual must be given broad construction (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301. If such principle is to stand and remain valid, s 56A of the CJA must be deemed unconstitutional especially in the light that it is a provision of law which allows a 'defacto stay' on the effect of the judgment of an acquittal and discharge of an individual by subsequently detaining that very individual when he has obtained a court pronouncement of his innocence or at least a 'not guilty' verdict. On this point learned counsel for the appellant referred to us the case of *The State (at the prosecution of Robert Trimbole otherwise known as Micheal Hanbury) v The Governor of Mountjoy Prison* [1985] IR 550 wherein the High Court of Ireland after an inquiry pursuant to art 40 (equivalent to our art 5) of their constitution to determine the lawfulness of the arrest of the subject held that there was illegality in the original arrest and the subject was immediately released. The respondent applied to the Supreme Court of Ireland for a stay of the order of the High Court to release the subject pending the appeal. The Irish Supreme Court (Finlay CJ, Walsh, Henchy, Griffin, Hederman and McCarthy JJ) in refusing the application, inter alia, held that:

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... whatever powers the court may have to make its ordinary appellate jurisdiction effective, such powers would not be exercised in a manner inconsistent with the Constitution ...

[12] Learned counsel for the appellant further submitted that it would not be just for the appellant to be arrested and detained simply on the basis of an appeal filed by the respondent. It must also be shown beyond reasonable doubt by the respondent in their affidavit in support of the s 56A of the CJA application that the judgment of the learned High Court judge was so perverse on the face of the record that the arrest and detention is justified to prevent an injustice from further occurring. It was also suggested that the prosecution must also tender a proposed petition of appeal to demonstrate the perverseness of the judgment of the trial court. A mere allegation of incorrect decision by the High Court judge as contended by the prosecution in the present case is not

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A enough, nor sufficient to deprive a person of his liberty that has been
deservingly earned after a full trial. In support of this proposition the case of
State of UP v Poosu & Anor 1976 3 SCC 1 was referred to us wherein His
Lordship RS Sarkaria J in delivering the judgment of the Supreme Court of
India at p 5, held as follows:

B In addition, the Court may also take into consideration the period during which the
proceedings against the accused were pending in the courts below and the period
which is likely to elapse before the appeal comes up for final hearing before this
Court. In the context, it must be remembered that this over-riding discretionary
C jurisdiction under Article 136 is invoked sparingly, in exceptional cases, where the
order of acquittal recorded by the High Court is perverse or clearly erroneous and
results in a gross miscarriage of justice.

DECISION OF THIS COURT

D [13] On the appellant's contention that due to the illegality of the arrest via
the defective warrant and its improper execution on the appellant, any remand
pursuant to such illegality would nullify the remand made pursuant to s 56A of
E the CJA, we are of the view that the defect in the warrant of arrest is not fatal
and does not affect the respondent's application. We agree with the views
expressed by the Court of Appeal that at the first stage of the ex parte
application, the respondent has fulfilled the threshold requirement to justify
F the granting of the warrant of arrest directing the respondent to be brought
before the court. The said warrant of arrest was issued pursuant to a valid legal
power of the court. It had been executed and the respondent was brought
before the court on 10 September 2013. The warrant itself made reference to
the provision of s 56A of the CJA and the order of the court given on
10 September 2013.

G [14] It is our judgment that there has not been a substantial miscarriage of
justice as a result of the flawed terms of the warrant as contended by the
appellant. This is because the court therein was required at the second stage of
H the inter partes hearing of the respondent's application either to remand the
appellant to prison or to admit him to bail. It is our considered view that any
irregularity of the initial arrest arising from the flawed terms of the warrant of
arrest had been overtaken by the subsequent event when the appellant was
brought before the court on 10 September 2013. The court had the
I jurisdiction to hear the second stage of the application notwithstanding any
irregularity or flaw in the terms of the warrant of arrest. On this point we would
refer to the case of *Saw Kim Hai & Anor v Regina* [1956] 1 MLJ 21 wherein
Spencer Wilkinson J held:

It is settled law that when an accused person is before a Court, the Court has jurisdiction to try him notwithstanding the fact that his arrest may have been illegal and it has recently been held by the Privy Council that the fact that evidence has been illegally obtained does not affect the question of its admissibility. (Emphasis added.)

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[15] As regards the appellant's contention on the unconstitutionality of s 56A of the CJA which allows the prosecution to effect his arrest and subsequent detention after his acquittal by the High Court and thereby violating his constitutional rights as guaranteed by arts 5(1) and 8(1) of the FC, with respect we could not agree with such a contention. On this issue the question is whether there is a specific law authorising such deprivation of the applicant personal liberties (see the case of *Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372). It is also to be noted that art 5(1) of the FC provides as follows:

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No person shall be deprived of his life or personal liberty save in accordance with law. (Emphasis added.)

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[16] The law on point is therefore s 56A of the CJA which is designed to confer judicial power upon the court to grant an order that will have the effect of preserving the integrity of any criminal appeal pending before it. It is intended to facilitate a full hearing of the appeal on its merits so that justice is not only done to the accused but also to the public and the state. Section 56A of the CJA in our considered view serves the specific purpose of ensuring that the right of the prosecution to appeal is not rendered academic or nugatory as a result of the absence or non-attendance of an accused who had been acquitted by the High Court (see the case of *Public Prosecutor (Deputy Public Prosecutor) v Norman bin Ismail* [2008] 4 MLJ 830).

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[17] On the question of whether s 56A of the CJA has infringed art 8(1) of the FC our answer to it is in the negative. Article 8(1) of the FC provides:

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All persons are equal before the law and entitled to equal protection of the law.

In the present case it is our finding that s 56A of the CJA applies to everybody whether a citizen or not. As long as an accused person is acquitted at the High Court, the public prosecutor can apply for a warrant under s 56A of the CJA. Section 56A of the CJA in our view is not discriminatory in nature. On the test as to whether the provision of a statute is discriminatory in nature we would refer to the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 where Suffian LP had this to say:

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With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be — if the laws is not discriminatory, if for instance it obviously applies to everybody, it is good law ...

- A [18] As regards the decision in the case of *The State (at the prosecution of Robert Trimbole otherwise known as Micheal Hanbury) v The Governor of Mountjoy Prison* cited by learned counsel for the appellant to support his argument on the unconstitutionality of s 56A of the CJA, we are of the view the said case can be distinguished on the facts from the present case. There, the
- B High Court of Ireland was dealing with a case which was related to a habeas corpus application challenging remand orders. Whereas our case here concerns the appellant who was charged with an offence of drugs trafficking and was subsequent acquitted and discharged. The appellant then appealed to the
- C Court of Appeal. Unlike the position in Ireland, our Court of Appeal is empowered under s 56A of the CJA to cause an accused person who has been acquitted to be arrested and committed to prison or given bail pending the disposal of the appeal against the acquittal. No such statutory power has been conferred on the Irish Supreme Court.
- D [19] Furthermore, in the present case, the prosecution has filed a notice of appeal against the acquittal decision of the High Court. On this point it is important to consider that an appeal is a continuation of a trial (see the case of *Balasingam v Public Prosecutor* [1959] 1 MLJ 193). Consequently, the criminal
- E proceedings against the appellant is continued. This gives jurisdiction to the Court of Appeal to rehear the case and decide on the appellant's guilt or innocence in respect of the drug trafficking charge against him. It is our judgment that the power to remand the appellant or admit him to bail pending the disposal of the appellant's appeal by the Court of Appeal is necessary for an
- F effective exercise of the court's jurisdiction over the offence allegedly committed by the appellant. It would not be desirable that pending the appeal against acquittal of a capital offence such as drug trafficking, the acquitted person should remain at large without conditions while his fate has yet to be decided by the appellate court.
- G [20] On learned counsel for the appellant's reliance on the case of *State of UP v Poosu & Anor* to support his contention that the prosecution must demonstrate that the order of acquittal recorded by the High Court is perverse or clearly erroneous and results in a gross miscarriage of justice, we are not in
- H agreement with him. In *Poosu's* case the Indian Supreme Court had set out some guidelines as to how powers under s 390 of the Indian Code of Criminal Procedure (in substance similar with our s 56A of the CJA) should be exercised. It is important to note that in *Poosu's* case the Indian Supreme Court was exercising its supervisory jurisdiction under art 136 of the Indian Constitution.
- I The said art 136 reserves supervisory jurisdiction over decision of all courts and tribunals. On the guidelines as to how powers under s 390 of the Indian Code of Criminal Procedure should be exercised as set out in *Poosu's* case, it is our considered view that some of the said guidelines ordinarily may be considered by our Court of Appeal when it is exercising its powers under s 56A of the CJA.

[21] As regards the suggestion of learned counsel for the appellant that the prosecution must also tender a proposed petition of appeal to demonstrate the perverseness of the judgment of the trial court, with respect we do not think that the prosecution is required to do so. It would be sufficient if the prosecution could show to the court that it has a strong likelihood of success in the appeal proper. On this point we need to state here that in most cases the full written judgment of the trial judge and the notes of proceedings would not be readily made available soon after the decision of the case is delivered. Therefore, in our view, at the stage of its application under s 56A of the CJA as in the present case, the prosecution would not be placed in a position to put up a proposed petition of appeal to state that the order of acquittal recorded by the High Court is perverse or clearly erroneous in the face of the record. We agree with the view expressed by the Court of Appeal that the merits of the prosecution's appeal in an application under s 56A of the CJA is not a relevant matter for consideration.

[22] For the reasons abovestated we find no merits in the appellant's appeal. The appeal is therefore dismissed.

Appeal dismissed.

Reported by Afiq Muhamad Noor

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